



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: U.S. Defense Systems, Inc.

File: B-245563.2

Date: November 3, 1992

Thomas D. Boyatt for the protester.
Kathleen D. Martin, Esq., Department of State, for the agency.
Christine F. Bednarz, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency reasonably awarded contract for security guard services to protect an embassy to the low-priced offeror, where the agency reasonably found that the awardee's and protester's technical proposals, including experience and personnel, are essentially equal.
2. Evaluation of proposals that was not strictly in accord with the solicitation's evaluation criteria--the evaluators accorded equal weight to criteria that were listed in descending order of importance and did not consider option prices as required--is not prejudicial to the protester where the protester's proposal would be rated slightly less advantageous to the government if scored properly.
3. Neither the Diplomatic Security Act nor other statutory or regulatory provisions prohibit foreign nationals employed by United States embassies from serving on proposal evaluation panels.

DECISION

U.S. Defense Systems, Inc. (USDS) protests the Department of State's selection of Group 4 Securitas (Cyprus) Ltd. for the award of a contract for security guard services to protect the United States Embassy in Nicosia, Cyprus. USDS alleges that the technical evaluation of USDS' and Group 4's proposals was unreasonable.

We deny the protest.

The agency issued the request for proposals (RFP) on May 15, 1991, which contemplated the award of a firm, fixed-price contract for a base year and 2 option years, based upon estimated levels of effort for standard and emergency guard services. The RFP provided that award would be made to the offeror whose proposal afforded the best value to the government, as determined by the sum of total scores awarded the technical and price factors. The technical evaluation was worth 60 points and the price evaluation was worth 40 points. The technical evaluation scheme stated factors and subfactors, listed in descending order of importance, as follows:

- (1) technical approach
 - (a) management plan
 - (b) knowledge and familiarity
- (2) technical personnel
 - (a) key personnel
 - (b) other personnel
- (3) experience and past performance

The RFP provided for a price evaluation inclusive of options where the lowest priced proposal would receive the maximum 40 points and the remaining proposals would receive a relative percentage of 40 points based upon the following formula:

$$\text{Price score} = \frac{\text{Lowest offeror's Price}}{\text{Offeror's price}} \times [40]$$

Eight offerors submitted proposals. Following the agency's initial evaluation, three proposals, including USDS' and Group 4's, were put in the competitive range. The agency did not conduct discussions with any of the three offerors, but requested the submission of best and final offers (BAFO) by August 30, 1991, to which each firm responded. The scores received by USDS and Group 4 were:

	<u>Technical</u>	<u>Price Score</u>	<u>Total Score</u>
Group 4	56	40	96
USDS	52	29.75	81.75

The contracting officer selected Group 4 for award because it had the highest combined technical/price score and awarded it the contract on September 4, 1991.

On September 9, 1991, USDS protested the award to our Office, claiming that the agency unreasonably found Group 4's proposal technically superior to its own and that a reasonable evaluation would have resulted in award to USDS, notwithstanding Group 4's price advantage. The agency defended the reasonableness of its evaluation and submitted as evidence each firm's final evaluation results, i.e., the

numerical point scores earned by USDS and Group 4 in the various technical categories, and a supporting affidavit from the contracting officer. In response to inquiries from our Office, the agency confirmed that it lacked any contemporaneous evaluation documentation or narratives to support the numerical point scores given to USDS and Group 4.

We sustained USDS' protest because the record did not contain adequate support for the agency's evaluation or source selection decision, and, without such supporting documentation, we were unable to determine whether the evaluation and award selection were reasonable and consistent with the stated criteria. U.S. Def. Sys., Inc., B-245563, Jan. 17, 1992, 92-1 CPD ¶ 89. We recommended that the Department of State reevaluate the BAFOs submitted, consistent with the technical evaluation factors listed in the RFP and, if appropriate, reopen discussions and request an additional round of BAFOs. We stated that the agency should properly document the reevaluation and award selection decision with contemporaneous narrative explanations for the offerors' scores, in accordance with applicable regulations. See Federal Acquisition Regulation (FAR) §§ 15.608, 15.612(d)(2). We further stated that, after implementing our recommendation, the agency should terminate Group 4's contract if the agency no longer considered it to represent the best value to the government.

On February 24, 1992, the contracting officer reconvened the Technical Evaluation Panel (TEP) to reevaluate the BAFOs consistent with our recommendation. The TEP consisted of the same two members who had previously scored the proposals. The contracting officer emphasized that the panel members should reevaluate the BAFOs without reference to the results of the first evaluation.

Upon reevaluation, the scores received by USDS and Group 4 were:

	<u>Technical</u>	<u>Price Score</u>	<u>Total Score</u>
Group 4	48	40	88
USDS	46.5	29.75	76.25

The panel members documented the reasons for the scores awarded and asserted that there was very little technical difference between the proposals. Based upon these evaluation results, the contracting officer confirmed the award to Group 4, owing to its significantly lower price for a technically comparable proposal. The agency notified USDS of the award on June 22, 1992, prompting this protest 4 days later.

USDS protests that the reevaluation conducted by the agency is unreasonable and inconsistent with the RFP's evaluation criteria, and that a comparison of the proposals will demonstrate that USDS' proposal is vastly technically superior to that of Group 4.

The evaluation of proposals is within the discretion of the procuring agency, since it is responsible for defining its needs and the best method of accommodating them, and must bear the burden resulting from a defective evaluation. Chaffins Realty Co., Inc., B-247910, July 8, 1992, 92-2 CPD ¶ 9. In cases challenging an agency's technical evaluation, our Office will not independently weigh the merits of offers; rather, we will examine the agency's evaluation to ensure that it was reasonable and consistent with the stated evaluation factors. OPSYS, Inc., B-248260, Aug. 6, 1992, 92-2 CPD ¶ 83. Implicit in the foregoing is that the agency must document these judgments in sufficient detail to show that they are not arbitrary. American President Line, Ltd., B-236834.3, July 20, 1990, 90-2 CPD ¶ 53; Hattral & Assoc., 70 Comp. Gen. 632 (1991), 91-2 CPD ¶ 90.

The protester's primary challenge to the technical evaluation is that USDS, in both its past performance history and its proposed key personnel, has significantly more embassy security experience than Group 4, whose guard experience was concentrated upon the protection of financial institutions and whose proposed personnel allegedly lack experience in dealing with security problems unique to embassies. However, the RFP did not confine the agency's attention to embassy security experience, but allowed for consideration of related guard experience. In this regard, the RFP's guard service requirements are drafted generally and do not require embassy security experience.

Based on our review of USDS' and Group 4's proposals against the RFP requirements, we disagree with USDS' contention that its proposal was demonstrably superior to Group 4's in the experience and technical personnel factors. Although Group 4 lacks USDS' degree of embassy security experience or large-scale contract experience, its proposal reflects a considerable body of related guard experience on the part of both the company and its key personnel, much of it in Cyprus, unlike USDS, which has little experience in Cyprus and whose proposal also includes some personnel with little guard experience. Based on our review, it was not unreasonable that USDS and Group 4 received roughly equal technical ratings for these evaluation factors.¹

¹The evaluation documentation does not support USDS' allegation that the TEP improperly considered the embassy
(continued...)

The protester does point to two instances where the agency failed to follow the stated evaluation criteria. In the first of these, the protester correctly observes that the agency improperly point-scored the technical personnel factor and the experience and past performance factor, giving the two factors equal weight (10 points each), instead of giving more points to the personnel factor, as required by the RFP.² However, there is no evidence that this error prejudiced USDS because, even if the agency rescored the proposals in the manner USDS suggests, the technical evaluation results would have remained virtually the same.³ See Dynamic Sys. Inc., B-233282, Feb. 15, 1989, 89-1 CPD ¶ 161.

In addition, the protester argues that the agency's price evaluation considered only offerors' base year prices, although the RFP provided for the evaluation of options. This error likewise did not prejudice USDS because Group 4 would maintain nearly the same price advantage over the other offerors had the agency evaluated options.⁴ See Ebasco Constructors Inc., B-231967, Nov. 16, 1988, 88-2 CPD ¶ 480.

¹(...continued)

security experience of Group 4's parent corporation, Group 4 Securitas (International) Ltd., to bolster its technical score; the reference to the parent corporation upon which USDS bases this allegation appears solely in the agency's assessment of Group 4's financial responsibility to perform the contract. We also note that the USDS entity that submitted this proposal is apparently a subsidiary of USDS formed just to submit a proposal on this RFP, yet the evaluators gave USDS credit for the embassy security experience of its parent company, although they expressed reservations about the offering USDS entity's recent formation and experience.

²We remarked on this defect in our prior decision, U.S. Def. Sys., Inc., supra at footnote 4, but the agency did not change its scoring scheme in the reevaluation.

³USDS suggests that the agency accord 30 points to the technical approach factor, 20 points to the technical personnel factor, and 10 points to the experience and past performance factor. Had the agency recalculated on this basis, Group 4's score would remain the same, 48 points, while USDS' score would decrease slightly to 46 points.

⁴USDS' price score would drop slightly if the agency evaluated options, from 29.75 points to 29.1 points, while Group 4 would earn the maximum 40 points as the low offeror under either scenario.

The protester argues that any confirmation of the award to Group 4 must be defective because we previously sustained its protest of the prior evaluation and award selection of Group 4. Contrary to USDS' assertion, our earlier decision did not find that Group 4's evaluation scores or award selection were unreasonable. Rather, we held that the reasonableness of Group 4's evaluation and award selection could not be determined because the agency had failed to adequately document its reasoning. In contrast, here the TEP, in reevaluating the BAFOs, justified each numerical point score given with a description of the offeror's ability to accomplish the RFP's technical requirements. See FAR §§ 15.608; 15.612(d). Thus, the record developed upon reevaluation does provide adequate support for the technical evaluation scores and award to Group 4.

USDS alleges bias on the part of the TEP in favor of Group 4 that led to the determination that the proposals were essentially technically equal. The protester relies upon the fact that the contracting officer retained the same two panel members to undertake the reevaluation, and believes that these evaluators would be predisposed to confirm the award to Group 4 to vindicate their first evaluation. In addition, one of the two panel members is a native of Cyprus,³ and the protester attributes prejudice to this evaluator in favor of the Cypriot-owned firm, Group 4, by virtue of his nationality. USDS also alleges that the use of a Cypriot citizen on the evaluation panel violates Section 136 of the Diplomatic Security Act, 22 U.S.C. § 4864(c)(2) (Supp. III 1991), which charges the Department of State to ensure that its diplomatic and consular post management take appropriate measures "to assure that United States persons . . . are not disadvantaged during the solicitation and bid evaluation process."

We do not interpret the Diplomatic Security Act to prohibit foreign citizens employed by embassies from serving on evaluation panels, as contended, nor are we aware of any other statutory or regulatory provision that creates such a proscription. In addition, USDS has not produced, nor can we find, any evidence to support that the TEP's evaluation of proposals was biased or discriminatory. We will not attribute bias in the evaluation of proposals on the basis of inference or supposition. Rodriguez & Assocs., B-245882.2, Feb. 21, 1992, 92-1 CPD ¶ 209. In any case, the record shows that the evaluators selected Group 4 for award because it offered a significantly lower price for a technically comparable proposal, not because they harbored any bias in that firm's favor.

³The Cypriot citizen in question is a foreign service national employee of the embassy.

We have reviewed the record, including the proposals and evaluation documentation, and have no basis to find unreasonable the Department of State's determination that USDS' and Group 4's proposals were essentially technically equal such that the award could be based on price. See Ogilvy, Adams & Rinehart, B-246172.2, Apr. 1, 1992, 92-1 CPD ¶ 332. Since Group 4's price was much lower than USDS' price, we find the award selection is reasonable. While USDS complains that Group 4's price reflects the use of lower-paid, less qualified guards, USDS has not shown that Group 4 proposed to employ unqualified guards or that its proposal was not essentially equal to USDS' when evaluated under the RFP criteria.

USDS next alleges that the Department of State engaged in impermissible discussions with Group 4 during the reevaluation, without resuming discussions with the remaining competitive range offerors. USDS bases its allegation upon a memorandum documenting the first meeting of the reconvened TEP. At that meeting, the contracting officer advised the evaluators that they could consider information relevant to an offeror's experience and past performance that was obtained after the award to Group 4.


We have carefully reviewed the record for evidence of improper post-BAFO communications between the agency and Group 4, but have found nothing that suggests the agency contacted any of the three offerors, including Group 4, during the reevaluation. In our view, the contracting officer's reference to post-award information relates to past experience checks. The record reflects at least some poor performance appraisals from employers of USDS. It does not appear that the information obtained from these reference checks was used by the evaluators in the final evaluation of the proposals. The record reflects that the evaluators were ultimately advised that they should not consider the reference checks in evaluating offerors' proposals. Although inquiries into USDS' employment history resulted in poor references, USDS' technical scores in all categories were very high and did not appear to consider the negative references. Thus, the record does not support the protester's allegation of improper post-BAFO discussions, or that references were improperly evaluated.

The protester finally objects to the agency's decision merely to reevaluate proposals, rather than reopen discussions and request new BAFOs. The agency elected not to reopen discussions and solicit new BAFOs because (1) its needs had not changed, (2) there were no uncertainties in the technical proposals, and (3) the awardee's price had been disclosed, such that a request for new BAFOs could result in an auction atmosphere. See FAR § 15.611(c). The

protester believes that a reopened competition was necessary because it would provide the agency an opportunity to correct various solicitation defects and otherwise amend the solicitation to reflect the allegedly changed conditions arising since the submission of first BAFOs. In particular, USDS claims that the RFP should include an evaluation preference for United States offerors pursuant to 22 U.S.C. § 4864, and should define the level of experience or wage categories required for the proposed guard force. The protester also asserts that Group 4 has hired a guard force that is paid less than was offered by USDS, which allegedly represents a change in the embassy's requirements.

To the extent that USDS bases its argument for reopened competition on the existence of solicitation defects, its protest, raised after the time set for receipt of initial proposals, is untimely. 4 C.F.R. § 21.2(a)(1) (1992); see also U.S. Def. Sys., Inc., supra, where we previously dismissed as untimely the protester's identical challenge to the RFP's lack of an evaluation preference for United States offerors.⁶ As to the protester's allegation that changed conditions warrant a reopened competition based upon an amended RFP, the fact that 1 year has elapsed since the submission of BAFOs, or that the awardee has employed a lower paid guard force than had been proposed by USDS, does not demonstrate a change in the embassy's security needs. The agency states that its security requirements have not changed during the past year and that the RFP, as issued, continues to reflect these requirements. The record contains nothing that contradicts the agency and provides no basis to require a reopened competition.

The protest is denied.


for James F. Hinchman
General Counsel

⁶Although we dismissed this aspect of USDS' protest, we observed that a domestic offeror preference was applicable to this RFP, pursuant to 22 U.S.C. § 4864. When we sustained USDS' protest on other grounds, we recommended that, if the agency requested new BAFOs, it should incorporate the preference in the evaluation scheme and notify offerors of this change. We did not recommend the competition to be reopened to correct this untimely protested deficiency.